NO. 628

IN THE

Supreme Court of the United States

October Term, 1969

DANIEL JAY SCHACHT, *Petitioner*

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The Opinion of the Circuit Court of Appeals, printed in Appendix C of the Petition for Writ of Certiorari in this cause, is reported at 414 F.2d 630.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1969 (R. 454). No Motion for Rehearing was filed. The Petition was granted December 15, 1969. The jurisdiction of this Court invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Are 18 U.S.C. §702 and 10 U.S.C. §772(f) supported by any compelling nonspeech governmental interest justifying limitation upon First Amendment rights of free speech?

II. Is the statutory scheme created by 18 U.S.C. §702 and 10 U.S.C. §772(f), a prior restraint, and/or an overbroad, vague, and indefinite impingement upon First and Fifth Amendment rights of free speech and due process?

III. Have 18 U.S.C. §702 and 10 U.S.C. §772(f) been unconstitutionally applied against Petitioner?

STATUTES INVOLVED

The statutory provisions involved are Title 18, U.S.C., Crimes and Criminal Procedure, §702, and Title 10, U.S.C., Armed Forces, §772(f).

STATEMENT

Petitioner was tried and convicted in the District Court for the unauthorized wearing of a distinctive part of an Armed Forces uniform.

In the District Court Petitioner attacked the Constitutionality of both 18 U.S.C., §702, and 10 U.S.C., §772 (f) and the constitutionality of their application to him, by his Motion to Quash indictment (R. 11-17).

The evidence, which is not in dispute, showed that the Petitioner took part in a nationally coordinated protest against the Vietnamese war in front of the Armed Forces

Induction Center in downtown Houston, Texas, from about 6:30 a.m. to 8:30 a.m. on December 4, 1967 (R. 101).

Petitioner wore a "fur felt Army officer's cap on his head with the strap loose and hanging down, and with an Army officer's insignia upside down. On his body * * * he had an Army green shade 44 enlisted blouse with a U. S. Army Europe patch on the left shoulder." (R. 173). The buttons on the blouse were "current authorized buttons." (R. 177). The blouse itself, and the eagle insignia on the cap were also current issue (R. 437). According to his own testimony, Petitioner was wearing "a pair of civilian boots, green civilian pants, a belt with silver buckle, regular shirt, dress green, rank insignia U. S. Army removed, no lapels, and the obsolete hat, World War II hat. The insignia was upside down, one strap was dangling." (R. 319).

Petitioner and others had practiced a skit concerning the Vietnamese war which they then presented before the Induction Center (R. 275, 276).

A newspaper reporter, present at the time, testified:

> "One would say, 'Be an able American,' and they would shoot the Viet Cong, and he would fall to the pavement, and they would walk up to the third person and kick the cape aside and say, 'My God, this is a pregnant woman.'" (R. 265)

Petitioner's point in taking part in the skit was to display his and the group's disapproval of the involvement of the United States Army in Vietnam (R. 334).

Subsequent to the above-described conduct, Petitioner was arrested and charged with violation of 18 U.S.C., §702. Petitioner was convicted on February 15, 1968, and sentenced to six (6) months to be served on March 4, 1968.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Petitioner raised the same questions concerning the constitutionality of the statutes and of their application to him as were raised by the Motion to Quash the Indictment in the District Court. The Fifth Circuit Panel affirmed the conviction and sentence of Petitioner, resting its Opinion on Petitioner's violation of 18 U.S.C., §702, and dismissing any argument that the Act(s) are unconstitutional or unconstitutionally applied (R. 447, 448).

SUMMARY OF ARGUMENT

The conviction of the Petitioner, under 18 U.S.C. §702 and 10 U.S.C. §772(f) is repugnant to the First and Fifth Amendments to the United States Constitution when tested by all traditional Supreme Court standards; in short, Petitioner was subjected to prosecution because he expressed unpopular political views.

ARGUMENT

I.

18 U.S.C. §702 and 10 U.S.C. §772(f) are supported by no compelling nonspeech governmental interest to justify any limitation on First Amendment rights of free speech.

During the last decade, the language of protest and dissent in our society has undergone a metamorphosis from

purely written or spoken communication to communication by a combination of pure and symbolic speech. This Court has not failed to take account of that metamorphosis and has over the years reaffirmed its holding in *Stromberg v. California,* 283 U.S. 359, that attempts to regulate speech under the guise of regulating conduct suffer from a constitutional infirmity. See, e.g., *Shuttlesworth v. City of Birmingham, Ala.,* ___ U.S. ___, (Mar. 10, 1969); *Gregory v. City of Chicago,* ___ U.S. ___, (Mar. 10, 1969); *Tinker v. Des Moines Ind. Community School Dist. No. 21,* ___ U.S. ___, (Feb. 24, 1969); *Brown v. Louisiana,* 383 U.S. 131; *Cox v. Louisiana,* 379 U.S. 536; *Edwards v. South Carolina,* 372 U.S. 229. Surely Petitioner's right to condemn United States' involvement in Vietnam should be welcome and necessary in a society that has traditionally protected under its constitution the expression of unpopular views. *Stromberg v. California,* supra; *Edwards v. South Carolina,* supra; *Terminiello v. Chicago,* 337 U.S. 1; *West Virginia v. Barnette,* 319 U.S. 624.

Carte blanche protection of all speech-related action is however unavailable. As held in *United States v. O'Brien,* 391 U.S. 367, regulation of conduct which incidentally limits First Amendment freedoms is sufficiently justified,

> "if it is within the constitutional power of the Government; if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . ." *United States v. O'Brien, supra* at 377.

It was precisely this principle which prompted Judge Goldberg's concurrence in the Fifth Circuit Court of Appeals' affirmance of Petitioner's conviction under 18 U.S.C. §702.[1] Yet Judge Goldberg found it difficult to precisely delineate the nonspeech interest furthered by 18 U.S.C. §702 which was so "compelling," "substantial," "subordinating," "paramount," "cogent," or "strong," (*United States v. O'Brien*, supra, at 376-7), as to justify limitations upon Petitioner's First Amendment freedom:

> "Whatever the object of such a restriction, whether to protect against the possibility of military impersonation, or simply to safeguard the need for a sure and expedient means of military identification, the restriction nonetheless has only the most remote and incidental effect upon free speech." *United States v. Schacht*, 414 F.2d 630 at 636-7.

Not only was it difficult for the one judge who recognized the problem to pinpoint the compelling governmental interest necessary to justify this regulation of conduct which he acknowledged affected free speech (albeit "the most remote and incidental effect"), but also Congress has itself demonstrated a recognition that the governmental interest in regulating the unauthorized wearing of distinctive parts of an armed forces uniform is not substantial or compelling by limiting its own proscription of that conduct. Thus, Congress has provided in 10 U.S.C. 772(f) that an actor in a theatrical or motion-picture production may wear an armed forces uniform if his portrayal does not "tend to discredit" that armed force. Petitioner would urge that an examination of this language compels the conclusion that the Title 18 limitation

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1. 18 U.S.C. §702, and its exception, 10 U.S.C. §772(f) are reproduced in Appendix A.

was not motivated by a nonspeech objective. How is it possible to justify on nonspeech grounds, a regulation which prohibits wearing of the uniform in a dramatic portrayal only if the portrayal "tends to discredit" the armed forces?

The lack of compelling governmental interest in controlling the wearing of distinctive parts of an armed forces uniform is particularly exemplified by the fact that the Government has authorized indiscriminate sale to the general public of all parts of armed forces uniforms (R. 243). Should it be argued that notwithstanding the federally created license to purchase all parts of armed forces uniforms, there nevertheless exists a compelling governmental interest in preventing the wearing of those uniforms, it would be logical to assume that one would find a plethora of convictions under the statutes here under attack. Such is not the case however, for prior to the cause at bar, only four convictions have been reported, the latest in 1949.

In short, the Government in prosecuting Petitioner Danny Schacht has engaged in a practice continually and vigorously denounced by this Court, the regulation of speech under the guise of regulating conduct. (See argument and authorities cited, *supra*, p. 5).

II.

The statutory scheme created by 18 U.S.C. 702 and 10 U.S.C. 772(f) is, in addition to being a prior restraint, an overbroad, vague, and indefinite impingement upon First and Fifth Amendment rights of free speech and due process.

Assuming, *arguendo*, that a substantial governmental nonspeech interest in regulating the wearing of distinctive

parts of an armed forces uniform may be demonstrated sufficient to justify incidental limitations on Petitioner's First Amendment freedoms, it is nevertheless clear that those limitations must be "no greater than is essential to the furtherance of that interest." *United States v. O'Brien, supra,* at 377. Congress recognized the danger of overbreadth which would attend a blanket proscription against wearing distinctive parts of a military uniform by enacting the Title 10 exception; yet Congress itself emasculated this limited grant of protection to oral and symbolic speech by saddling the Title 10 exception with the requirement that those wearing distinctive parts of armed forces uniforms in theatrical or motion-picture productions, reflect either credit or nothing at all on the uniform involved.

The objection to this statutory scheme in which Petitioner has become ensnared is twofold.

First, the questions raised by the imprecision of 18 U.S.C. 702 and 10 U.S.C. 772(f) are myriad. What does "discredit" mean? What does "tend to discredit" mean? By whom and when are these questions to be answered? Why is the uniform of the Coast Guard excepted from the exception? What is a theatrical or motion-picture production? Is a skit under the trees protected? By virtue of these unanswerable questions, a potential communicator is placed in the constitutionally untenable position of having either to purchase certainty by refraining from engaging in what may very well be constitutionally protected activity, cf. *Dombrowski v. Pfister,* 380 U.S. 479, or to join the ranks of "those hardy enough to risk criminal prosecution [and conviction] to determine the proper scope of regulation." *Dombrowski v. Pfister,* supra, at

487. See also *Near v. Minnesota,* 283 U.S. 697. Such uncertainty renders the statutory scheme void for indefiniteness. *Winters v. New York,* 333 U.S. 507.

Having been subjected to criminal prosecution subsequent to his participation in the anti-Vietnam skit, Petitioner might as well have been subjected to a judicial or administrative determination of the statutory significance of his role and costume before he engaged in the activity. For as *Near v. Minnesota,* supra, teaches such post-speech litigation subjects one such as Petitioner to no less than a classical prior restraint on his free speech.

Secondly, even were the Fifth Circuit Court of Appeals correct in its conclusion that "the language of legislative grace is amply clear," *United States v. Schacht, supra,* at 636, it would nevertheless be an inescapable conclusion that the statutory scheme suffers from overbreadth. It can hardly be denied that today criticism or derision of any institution of government is guaranteed by the First Amendment (discussed *supra* at p. 5), and statutory schemes which are drawn so broadly as to include within their scope or proscription just such constitutionally protected areas of free speech, have been struck down by this Court so many times that the validity of any argument to the contrary is foreclosed. *Shuttlesworth v. Birmingham, supra; Brown v. Louisiana, supra; Cox v. Louisiana, supra; Edwards v. North Carolina, supra; Garner v. Louisiana,* 368 U.S. 157; *Stromberg v. California, supra.*

To thwart any contention that the objection to the statutory scheme would be cured by simply voiding the Title 10 exception, one need only consider the overbreadth and imprecision that inheres in 18 U.S.C. §702 standing alone.

For instance, what constitutes a distinctive part of an armed forces uniform? From whom does one obtain authority to wear the uniform? The vagueness of this statute offends due process requirements of clarity and notice. *Winters v. New York, supra.* But even more important, Congress explicitly recognized an area of free speech into which its proscription concerning the wearing of distinctive parts of an armed force uniform should not reach, i.e., the drama; should 10 U.S.C. 772(f) be voided, 18 U.S.C. 702 undoubtedly would reach this protected area.

III.

18 U.S.C. §702 and 10 U.S.C. §772(f) have been unconstitutionally applied against Petitioner.

Because the statute under which Petitioner was convicted is so broad, there exists the danger that 18 U.S.C., §702 and 10 U.S.C., §772(f) may be applied in an uneven and discriminatory fashion. *Brown v. Louisiana, supra; Edwards v. South Carolina, supra; Shuttlesworth v. Birmingham, supra.* What Petitioner, Danny Schacht did was to publicly present his private suspicion that Vietnamese civilians were the victims of American military action — a suspicion which, in light of recent disclosures concerning alleged military massacres in Vietnam, might very well be justified; in any event, his expressed views of the war were not calculated to win favor with the Government. Thus, at the whim of the United States Attorney, 18 U.S.C. §702 was resurrected for the sole purpose of quieting a dissident, perhaps prophetic, voice. The law involved then became a deadly governmental

weapon ". . . deliberately and purposefully applied solely to terminate the reasonable, orderly and limited right to protest . . ." *Brown v. Louisiana, supra,* at 724.[2]

It is also well settled that statutes constitutional on their face may nevertheless be applied unconstitutionally. *Yick Wo v. Hopkins,* 118 U.S. 346. Thus, Petitioner contends that should the statutes be declared facially valid, his conviction should nevertheless be reversed because the statute was unlawfully applied against him.

Petitioner's conviction is only the fifth reported under the statute and the first since 1949 (*supra*). This is not the only evidence of disuse of and disinterest in the statute: the Government permits sale of armed forces uniforms to the general public (*supra*), and has failed to prosecute the multitude of citizens wearing distinctive parts of armed forces uniforms, e.g., hunters in their Navy pea jackets, teenagers in their Army raincoats, and for that matter, uniformed actors who make fools of the officers they portray, e.g., the portrayal of General Turgidson in *Dr. Strangelove,* and of Sergeant Bilko in *"You'll Never Get Rich."*

The conclusion demanded is that the prosecution of this Petitioner for the wearing of distinctive parts of the United States Army uniform in an anti-Vietnam skit was arbitrary and deprived Petitioner of his fundamental right of freedom of speech under the First Amendment and of the basic guarantee of equal protection under the law implicit in the due process clause of the Fifth Amendment. *Bolling v. Sharp,* 347 U.S. 497.

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2. A careful examination of the record reveals that the demonstration was unquestionably peaceful and orderly.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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DAVID H. BERG

Stuart M. Nelkin
STUART M. NELKIN

Chris Dixie
CHRIS DIXIE
Counsel for Petitioner

February, 1970

MOTION TO ALLOW APPEARANCE PRO HOC VICE

COMES NOW CHRIS DIXIE, a member of this Bar, and moves this Honorable Court to allow DAVID H. BERG and STUART M. NELKIN, attorneys for Petitioner herein, the opportunity to argue this case before this Court *pro hoc vice*, inasmuch as Attorneys Berg and Nelkin have not practiced long enough to satisfy the requirements of membership before the Supreme Court Bar.

Respectfully submitted,

Chris Dixie
CHRIS DIXIE

APPENDIX A

Title 18 U.S.C. Sec. 702

Whoever in any place within the jurisdiction of the United States or the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service, or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both. June 25, 1948 c. 645, 62 Stat. 732; May 24, 1949, c. 139, Sec. 15(a), 63 Stat. 91.

Title 10 U.S.C. Sec. 772(f)

While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force. Title 10, U.S.C., §772(f).

APPENDIX B

FIRST AMENDMENT

Congress shall make no law restricting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment for indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.